



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Angie McKinstry
Treasurer
Darren White for Congress
P.O. Box 16601
Albuquerque, NM 87191

MAY 29 2009

RE: MUR 6120
Darren White for Congress and Angie
McKinstry, in her official capacity as
treasurer

Dear Ms. McKinstry:

On November 5, 2008, the Federal Election Commission notified Darren White for Congress and you, as treasurer, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On May 20, 2009, the Commission found, on the basis of the information in the complaint, that there is no reason to believe Darren White for Congress, and Angie McKinstry, in her official capacity as treasurer, violated 2 U.S.C. §§ 441a(f) and 434(b). Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

If you have any questions, please contact Kathryn Lefeber, the attorney assigned to this matter at (202) 694-1650.

Sincerely,

A handwritten signature in cursive script that reads "Susan L. Lebeaux".

Susan L. Lebeaux
Assistant General Counsel

Enclosure

Factual and Legal Analysis for Darren White and Darren White for Congress

29044244173

FEDERAL ELECTION COMMISSION

RESPONDENTS: Darren White **MUR 6120**
 Darren White for Congress and Angie McKinstry,
 in her official capacity as treasurer

I. INTRODUCTION

As discussed in more detail below, it appears that “Can’t Trust” was not a coordinated communication because it does not meet the conduct prong of the Commission’s coordinated communications regulations. Therefore, the Commission finds no reason to believe that Darren White or the White Committee, accepted an excessive contribution in violation of 2 U.S.C. § 441a(f). Further, the Commission finds no reason to believe that the White Committee failed

1 to properly report the coordinated communication in violation of 2 U.S.C. § 434(b), and closes
2 the file.

3 **II. FACTUAL AND LEGAL ANALYSIS**

4 **a. Facts**

5
6 "Can't Trust" began airing on October 14, 2008, on New Mexico television stations. The
7 advertisement features images of candidate Martin Heinrich and states "[w]e just can't trust
8 Martin Heinrich." The advertisement further claims that "it's a disgrace" that Heinrich smeared
9 his opponent, a former soldier, and discusses Heinrich's stance on issues related to troops in Iraq.
10 The RCCNM disclosed to the Commission on its 2008 Pre-General Report that it made
11 disbursements of \$240,000 and \$100,000 on October 14 and 15, 2008, respectively, to Stevens,
12 Reed, Curcio & Potholm ("SRCP"), the media firm that created "Can't Trust," for independent
13 expenditures that oppose Martin Heinrich's candidacy.

14 The complaint's allegation that the RCCNM coordinated with Darren White and the
15 White Committee in producing "Can't Trust" is based on White's New Mexico Republican Party
16 ("NMRP") Executive Committee membership. Complaint at 4. It asserts that as a result of this
17 affiliation, the RCCNM, the federal committee of the NMRP, would not have aired an
18 advertisement without assent, material involvement of, or substantial discussion with, White or
19 one of his agents. *Id.* Attached to the complaint is a list of the thirty-nine NMRP Executive
20 Committee members, including White. *Id.*, Attachment 1. The complaint alleges that because of
21 the purported coordination, RCCNM made, and White and the White Committee accepted, an
22 excessive, in-kind contribution. *Id.*

23 The response from White denies any coordination related to "Can't Trust." Darren White
24 asserts that the complaint assumes coordination based only on his involvement in the NMRP

29044244175

Executive Committee. White Response at 2. White maintains, however, that the NMRP Executive Committee has not had a meeting since December 2007, well over a year before the advertisement aired, and that White did not even attend that meeting. *Id.* According to information obtained by the Commission, the RCCNM hired an independent consultant, Ben Burger at SRCP, to run its independent expenditure program separate from the RCCNM. Burger avers that he hired his own staff, designed the ads, hired and supervised the media consultants who bought the time and filmed the ads, and supervised the selection of the stations and broadcast times for the ad. The information obtained by the Commission also shows that the RCCNM maintained a firewall to prevent coordination with White and the White Committee. The firewall strictly prohibited Burger and his staff from contacting or receiving information not publicly available from any of the benefiting campaigns or their agents about any aspect of the campaigns' strategy or political advertising. Only RCCNM's legal counsel was authorized to contact Burger for legal compliance purposes.

Finally, the complaint alleges that the White Committee may have failed to properly report its alleged coordinated communication to the Commission. Complaint at 4. White denies this allegation because he maintains that there was no coordination in conjunction with "Can't Trust."

b. Legal Analysis

1. Coordination

The central issue in this matter is whether the RCCNM's advertisement, "Can't Trust," was coordinated with Darren White or the White Committee resulting in an excessive contribution. The Act provides that coordinated communications, those made by any person "in cooperation, consultation, or concert, with or at the request or suggestion of," a candidate, the

29044244176

1 candidate's authorized political committee, or of a state committee of a political party, are
2 considered a contribution to that candidate or committee. 2 U.S.C. § 441a(a)(7)(B)(i) and (ii),
3 11 C.F.R. § 109.21(b)(1). As described in more detail below, it appears "Can't Trust" was not a
4 coordinated communication, and therefore did not constitute a contribution to White's
5 campaign.¹

6 Under the Commission's regulations, a political party communication is coordinated with
7 a candidate, a candidate's authorized committee, or agent of the candidate and therefore
8 constitutes an expenditure on behalf of the candidate, when the communication satisfies the
9 three-pronged test set forth in 11 C.F.R. § 109.37: (1) the communication is paid for by a
10 political party committee or its agent; (2) the communication satisfies at least one of the content
11 standards set forth in 11 C.F.R. § 109.37(a)(2); and (3) the communication satisfies at least one
12 of the conduct standards set forth in 11 C.F.R. § 109.21(d).

13 "Can't Trust" satisfies the first prong of the political party coordinated communications
14 test because the RCCNM paid for "Can't Trust." It also meets the content prong because the
15 television advertisement was a public communication that referred to candidate Martin Heinrich,
16 and was publicly disseminated in Heinrich's jurisdiction on or around October 14, 2008, fewer
17 than 90 days before the November 4, 2008, general election. See 11 C.F.R. § 109.37(a)(2), see

¹ The U.S. District Court for the District of Columbia held that the Commission's revisions of the content and conduct standards of the coordinated communications regulation at 11 C.F.R. § 109.21(e) and (d) violated the Administrative Procedure Act; however, the court did not enjoin the Commission from enforcing the regulations. See *Shays v. F.E.C.*, 308 F. Supp. 2d 10 (D.D.C. 2007) (granting in part and denying in part the respective parties' motions for summary judgment). The D.C. Circuit affirmed the district court with respect to, *inter alia*, the current standard for public communications made before the time frames specified in the standard, and the rule for when former campaign employees and common vendors may share material information with other persons who finance public communications. See *Shays v. F.E.C.*, 528 F.3d 914 (D.C. Cir. 2008).

1 also 11 C.F.R. § 100.26 (a “public communication” includes “a communication by means of any
2 broadcast, cable, or satellite communication”).

3 While “Can’t Trust” meets the first and second prongs of the coordination test, it does not
4 meet the conduct prong. The third prong requires one of six types of conduct to occur: (1) the
5 communication is “created, produced, or distributed at the request or suggestion of a candidate or
6 an authorized committee,” or the communication is created, produced, or distributed at the
7 suggestion of the payor and the candidate or authorized committee assents to the suggestion;
8 (2) the candidate, his or her committee, or their agent is materially involved in the content,
9 intended audience, means or mode of communication, the specific media outlet used, or the
10 timing or frequency of the communication; (3) the communication is created, produced, or
11 distributed after at least one substantial discussion about the communication between the person
12 paying for the communication or that person’s employees or agents, and the candidate or his or
13 her authorized committee, his or her opponent or opponent’s authorized committee, a political
14 party committee, or any of their agents; (4) a common vendor uses or conveys information
15 material to the creation, production, or distribution of the communication; (5) a former employee
16 or independent contractor uses or conveys information material to the creation, production, or
17 distribution of the communication; and (6) the dissemination, distribution, or republication of
18 campaign materials. 11 C.F.R. § 109.21(d).

19 White’s membership on the Executive Committee of the NMRP is the sole basis for the
20 complaint’s allegation that White and the White Committee coordinated “Can’t Trust” with the
21 RCCNM, the NMRP’s federal committee. Complaint at 4. However, in his response, White
22 denies any coordination between himself and the RCCNM, and maintains that he had no part in
23 creating nor did he assent to the creation and airing of “Can’t Trust.” We have no evidence to

29044244178

1 the contrary, and no information that any of the other conduct standards have been met. See
2 MUR 5754 (MoveOn.org Voter Fund)(finding no reason to believe coordination between
3 MoveOn.org and John Kerry for President Inc. had occurred because there was no specific
4 information that suggested the conduct prong had been triggered).

5 Since it appears that "Can't Trust" was not a coordinated communication under the
6 Commission's regulations, the advertisement was not an in-kind contribution to White or the
7 White Committee. Therefore, the Commission finds no reason to believe that Darren White or
8 Darren White for Congress and Angie McKinstry, in her official capacity as treasurer, accepted
9 an excessive contribution in violation of 2 U.S.C. § 441a(f), in connection with "Can't Trust."²

10 2. Reporting

11 The remaining allegation, that the White Committee failed to properly report
12 coordination to the Commission, is based on the complaint's coordination allegation. Since it
13 appears that "Can't Trust" was not a coordinated communication, the Commission finds no
14 reason to believe that Darren White for Congress and Angie McKinstry, in her official capacity
15 as treasurer, failed to properly report coordinated communications to the Commission in
16 violation of 2 U.S.C. § 434(b).

² The only allegation involving Darren White for Congress and Angie McKinstry, in her official capacity as treasurer, is based on the alleged acts of the candidate, as the Committee's agent. Since the candidate did not engage in coordination, neither did the Committee.



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

W. Ryan Teague
General Counsel
Freedom's Watch, Inc.
401 9th Street, NW
Washington, DC 20004

MAY 29 2009

RE: MUR 6120
Freedom's Watch, Inc.

Dear Mr. Teague:

On November 5, 2008, the Federal Election Commission notified your client, Freedom's Watch, Inc., of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On May 20, 2009, the Commission found, on the basis of the information in the complaint, and information provided by you, that there is no reason to believe Freedom's Watch, Inc. violated 2 U.S.C. §§ 441a(a), 441b(a), 433 and 434(b). Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

If you have any questions, please contact Kathryn Lefeber, the attorney assigned to this matter at (202) 694-1650.

Sincerely,

A handwritten signature in cursive script that reads "Susan L. Lebeaux".

Susan L. Lebeaux
Assistant General Counsel

Enclosure

Factual and Legal Analysis for Freedom's Watch, Inc.

29044244180

1 **FEDERAL ELECTION COMMISSION**

2
3 **FACTUAL AND LEGAL ANALYSIS**
4
5

6
7 **RESPONDENTS:** Freedom's Watch, Inc.

MUR 6120

8
9 **I. INTRODUCTION**

10 This matter was generated by a complaint filed with the Federal Election Commission by
11 Brian S. Colón, Chairman of the Democratic Party of New Mexico. See 2 U.S.C. § 437g(a)(1).
12 The complaint alleges several violations of the Federal Election Campaign Act of 1971, as
13 amended ("the Act"), stemming from a television advertisement, "Asked to Explain," criticizing
14 Martin Heinrich, a candidate for U.S. House of Representatives in New Mexico's First
15 Congressional District. Specifically, the complaint alleges that "Asked to Explain," reported as
16 an electioneering communication by Freedom's Watch, Inc. ("Freedom's Watch"), a nonprofit
17 corporation, was coordinated with the RCCNM, resulting in an excessive and prohibited
18 contribution. *Id.* at 4. Based on the coordination allegation, the complaint also alleges that
19 Freedom's Watch failed to register as a political committee with the Commission and that
20 Freedom's Watch may have failed to properly report coordinated communications to the
21 Commission. *Id.* The responses from the RCCNM and Freedom's Watch deny any
22 coordination.

23 As discussed in more detail below, it appears that "Asked to Explain" was not a
24 coordinated communication because it did not meet the conduct prong of the Commission's
25 coordinated communications regulations. Therefore, the Commission finds no reason to believe
26 that Freedom's Watch made excessive contributions in violation of 2 U.S.C. § 441a(a), and no
27 reason to believe that Freedom's Watch made prohibited contributions in violation of 2 U.S.C.

29044244181

§ 441b(a). Further, the Commission finds no reason to believe that Freedom's Watch failed to register as a political committee in violation of 2 U.S.C. § 433, and no reason to believe that Freedom's Watch failed to properly report coordinated communications in violation of 2 U.S.C. § 434(b), and close the file.

II. FACTUAL AND LEGAL ANALYSIS

a. Facts

"Asked to Explain" began airing on October 15, 2008, on New Mexico television stations. The advertisement features images of Heinrich and states that he "skirted" ethics laws while on the city council and as a lobbyist. It instructs viewers to call Heinrich and ask him to support the State Ethics Commission Act. On FEC Form 9, 24 Hour Notice of Disbursements for Electioneering Communications, dated October 15, 2008, Freedom's Watch disclosed that it disbursed \$9,997 on October 10, 2008, to SRCP for "media production" of "Asked to Explain." The complaint alleges that "Asked to Explain" was a coordinated communication because both Freedom's Watch and the RCCNM used the same vendor, SRCP, to produce television advertisements criticizing Martin Heinrich; both advertisements used the same two images of Heinrich; and because Carl Forti, a former National Republican Congressional Committee ("NRCC") employee, is now a Freedom's Watch employee. As a result of the coordination, the complaint alleges, Freedom's Watch made, and the RCCNM accepted, an excessive and prohibited in-kind contribution. *Id.*

The response from Freedom's Watch denies any coordination related to "Asked to Explain." Freedom's Watch asserts that while SRCP worked for both Freedom's Watch and RCCNM, SRCP followed a strict firewall policy compliant with the Commission's guidance. Freedom's Watch Response at 1. Paul Curcio, the SRCP partner who assisted Freedom's Watch

29044244182

29044244183

1 in creating "Asked to Explain," avers, in an affidavit attached to Freedom's Watch's response,
2 that he adhered to the firewall policy and did not work on the RCCNM's advertisement, "Can't
3 Trust," or even know of its existence, until it aired publicly, despite it being produced by his
4 firm. Curcio Aff. ¶ 4. Curcio further avers that he had no communication with the RCCNM or
5 his partner Ben Burger, who worked on "Can't Trust," regarding "Asked to Explain." *Id.* In
6 addition, he avers that he personally found the photographs of Martin Heinrich used in "Asked to
7 Explain" from an independent internet search and did not share them. *Id.* ¶ 8. Finally,
8 Freedom's Watch's response states that while Carl Forti, Freedom's Watch's Executive Vice
9 President of Issue Advocacy, was a former senior NRCC employee, he ended his work at the
10 NRCC on December 31, 2006, well before the 120-day window in the Commission's regulations
11 within which communications are considered coordinated when paid for by a former employer.
12 Freedom's Watch Response at 2; *see* 11 C.F.R. § 109.21(d)(5).

13 Information obtained by the Commission indicates that the RCCNM's firewalled
14 independent expenditure program used to produce "Can't Trust" also protected it from
15 coordination with Freedom's Watch in "Asked to Explain." Ben Burger avers that "[a]t no time
16 while I was employed by RCCNM did I share any information with any agents or employees of
17 Freedom's Watch...." Burger Aff. ¶ 8. He also states that he did not witness any other
18 information sharing between RCCNM and Freedom's Watch. *Id.* Finally, he stated that the
19 image of Martin Heinrich that appeared in the "Asked to Explain" advertisement and the "Can't
20 Trust" advertisement was obtained from a Google search of publicly available information. *Id.*
21 ¶ 7.

22 On the assumption that there was coordination between Freedom's Watch and RCCNM,
23 the complaint also alleges that Freedom's Watch made expenditures in excess of \$10,000 but

1 failed to register as a political committee with the Commission. Finally, the complaint alleges
2 that Freedom's Watch may have failed to properly report its alleged coordinated communication
3 to the Commission. Complaint at 4. Freedom's Watch denies the allegation because it maintains
4 that there was no coordination in conjunction with "Asked to Explain."

5 **b. Legal Analysis**

6 **1. Coordination**

7 The central issue in this matter is whether Freedom's Watch's advertisement, "Asked to
8 Explain," was coordinated with the RCCNM, resulting in an excessive and prohibited
9 contribution. The Act provides that coordinated communications, those made by any person "in
10 cooperation, consultation, or concert, with or at the request or suggestion of," a candidate, the
11 candidate's authorized political committee, or of a state committee of a political party, are
12 considered a contribution to that candidate or committee. 2 U.S.C. § 441a(a)(7)(B)(i) and (ii),
13 11 C.F.R. § 109.21(b)(1). As described in more detail below, it appears that "Asked to Explain"
14 was not a coordinated communication, and, therefore, did not constitute a contribution to the
15 RCCNM.¹

16 Under the Commission's regulations, a communication is coordinated with a political
17 party committee or an agent of the committee and therefore constitutes an expenditure on behalf
18 of the political party committee, when the communication satisfies the three-pronged test set

¹ The U.S. District Court for the District of Columbia held that the Commission's revisions of the content and conduct standards of the coordinated communications regulation at 11 C.F.R. § 109.21(c) and (d) violated the Administrative Procedure Act; however, the court did not enjoin the Commission from enforcing the regulations. *See Shays v. F.E.C.*, 508 F. Supp. 2d 10 (D.D.C. 2007) (granting in part and denying in part the respective parties' motions for summary judgment). The D.C. Circuit affirmed the district court with respect to, *inter alia*, the current standard for public communications made before the time frames specified in the standard, and the rule for when former campaign employees and common vendors may share material information with other persons who finance public communications. *See Shays v. F.E.C.*, 528 F.3d 914 (D.C. Cir. 2008).

1 forth in 11 C.F.R. § 109.21: (1) the communication is paid for, in whole or in part, by a person
2 other than that political party committee; (2) the communication satisfies at least one of the
3 content standards set forth in 11 C.F.R. § 109.21(c); and (3) the communication satisfies at least
4 one of the conduct standards set forth in 11 C.F.R. § 109.21(d).

5 "Asked to Explain" satisfies the first prong because Freedom's Watch paid for the
6 advertisement. It also satisfies the content prong because "Asked to Explain," a television
7 advertisement, was a public communication that refers to a clearly identified House candidate,
8 Martin Heinrich, and was publicly disseminated in Heinrich's jurisdiction on or around October
9 15, 2008, fewer than 90 days before the November 4, 2008, general election. *See* 11 C.F.R.
10 § 100.26.

11 The third prong requires one of six types of conduct to occur: (1) the communication is
12 "created, produced, or distributed at the request or suggestion of a candidate or an authorized
13 committee," or the communication is created, produced, or distributed at the suggestion of the
14 payor and the candidate or authorized committee assents to the suggestion; (2) the candidate, his
15 or her committee, or their agent is materially involved in the content, intended audience, means
16 or mode of communication, the specific media outlet used, or the timing or frequency of the
17 communication; (3) the communication is created, produced, or distributed after at least one
18 substantial discussion about the communication between the person paying for the
19 communication or that person's employees or agents, and the candidate or his or her authorized
20 committee, his or her opponent or opponent's authorized committee, a political party committee,
21 or any of their agents; (4) a common vendor uses or conveys information material to the creation,
22 production, or distribution of the communication; (5) a former employee or independent
23 contractor uses or conveys information material to the creation, production, or distribution of the

29044244185

1 communication; and (6) the dissemination, distribution or republication of campaign materials.

2 11 C.F.R. § 109.21(d).

3 The complaint alleges that Freedom's Watch and RCCNM met the conduct prong with
4 respect to "Asked to Explain" in three ways. First, the complaint alleges that the same two
5 images of Martin Heinrich appeared in both RCCNM's advertisement, "Can't Trust" and in
6 Freedom's Watch's advertisement, "Asked to Explain." Second, the complaint alleges that the
7 conduct prong was met because a common vendor, SRCP, used material information in the
8 RCCNM advertisement and then used the same information in the Freedom's Watch
9 advertisement. Third, the complaint alleges that the conduct prong was met because Freedom's
10 Watch is run by a former NRCC employee. The available information does not support the
11 complaint's allegations.

12 Regarding the two common images of Heinrich, it appears that the safe harbor for
13 publicly available sources protects Freedom's Watch. The Commission's regulations
14 specifically state that the conduct prong is not satisfied "if the creation, production, or
15 distribution of the communication was obtained from a publicly available source." 11 C.F.R.
16 § 109.21(d)(2)-(5), *see also Coordinated Communications*, 71 Fed. Reg. 33190, 33205 (June 8,
17 2006). Ben Burger, producer of "Can't Trust" avers that the "image of Martin Heinrich that
18 appeared in the 'Asked to Explain' advertisement and the 'Can't Trust' advertisement was
19 obtained from a public source (internet image search using GOOGLE)." Burger Aff. ¶ 7.
20 Similarly, Paul Curcio, producer of "Asked to Explain" avers that he "identified the image of
21 Martin Heinrich used in 'Asked to Explain' by conducting an internet search of images from the
22 public domain and gathered that image for use in 'Asked to Explain' from a publicly available
23 source." Curcio Aff. ¶ 8. The Commission was able to locate one of the Heinrich images used

29044244186

1 in the advertisements through a Google image search. Although the Commission could not
2 locate the other image, that is not dispositive because Google image searches locate images
3 posted online, which may be removed. Thus, based on the affidavits of Burger and Curcio, it
4 appears that both RCCNM's and Freedom's Watch's use of the same two images falls under the
5 safe harbor for information from publicly available sources, and does not meet the conduct
6 standard.

7 Moreover, the use of the same images of Martin Heinrich in both advertisements does not
8 meet the conduct prong because it appears that the Commission's safe harbor for establishment
9 and use of a firewall was applicable. *See* 11 C.F.R. § 109.21(h), *see also Coordinated*
10 *Communications*, 72 Fed. Reg. 33190, 33207. In its response, Freedom's Watch showed that it
11 had designed and implemented effective firewalls that prohibited the flow of information
12 between employees providing services to Freedom's Watch and those employees providing
13 services to the RCCNM. Freedom's Watch attached to its response a copy of SRCP's firewall
14 policy, signed by Paul Curcio on August 20, 2008, as well as an affidavit from Curcio, which
15 demonstrated how SRCP's firewall was designed and implemented. Curcio, who worked on
16 "Asked to Explain," averred that as a result of the policy, he had no knowledge that Ben Burger,
17 his SRCP colleague, had been engaged by RCCNM to create "Can't Trust," until he saw the
18 broadcasts. Curcio Aff. ¶ 4. Curcio further averred that he had no communication regarding the
19 advertisements with Ben Burger. *Id.*

20 Ben Burger averred that he and his SRCP employees were strictly prohibited from
21 contacting or receiving any information not publicly available from any of the benefitting
22 campaigns, including the RCCNM and Freedom's Watch. Burger Aff. ¶ 5. The RCCNM further
23 restricted Burger's communications by only allowing RCCNM's legal counsel to contact Burger,

29044244187

1 in an effort to ensure that RCCNM staff who could have had any contact with any political
2 candidate or campaign did not share information with Burger. Burger Aff. ¶ 6, Kenicott Aff. ¶ 6.
3 In addition, Freedom's Watch attached its own vendor firewall policy to its response. The
4 policy, signed by Paul Curcio on July 17, 2008, states that each "FW vendor is prohibited from
5 discussing the FW issue advocacy program with a...political party committee." Freedom's
6 Watch Policy at 1.

7 Thus, based on the public availability and firewall safe harbors, the two images of
8 Heinrich used in both advertisements do not appear to meet the conduct standard. *See* MUR
9 5743 (Sutton) (identical photographs used in direct mailers and on Congresswoman's website did
10 not satisfy the conduct prong because affidavits stated that there was no coordination, the images
11 were from a publicly available source, and a firewall was in place).

12 Second, the use of a common vendor, in and of itself, has not been found by the
13 Commission to be sufficient to meet the conduct prong of the coordination test. *See* MUR 6050
14 (Boswell) (Commission found that merely having a common vendor without more is not
15 sufficient to establish coordination). The Commission's regulations require three elements, in
16 relevant part, for a common vendor to satisfy the conduct prong: (1) the person paying for the
17 communication employed a commercial vendor, as defined in section 116.1, to create, produce
18 or distribute the communication; (2) the commercial vendor developed a media strategy,
19 developed the content of, and produced, a public communication, and selected personnel to
20 provide the services to a political party committee within the past 120 days; and (3) the
21 commercial vendor used or conveyed to the person paying for the communication, information
22 about the political party committee that is material to the creation, production, or distribution of
23 the communication. 11 C.F.R. § 109.21(d)(4)(i)-(iii).

29044244188

SRCP's relationship with Freedom's Watch and with the RCCNM appears to satisfy only the first two of the three common vendor elements. The first requirement is fulfilled because Freedom's Watch, the payor for "Asked to Explain," contracted with SRCP, a commercial vendor, to create, produce and distribute the advertisement. Curcio Aff. ¶ 1, *see* 11 C.F.R.

§ 116.1(c). The second element is met because SRCP provided creative and strategic services to the RCCNM during the same time-period it was providing similar services to Freedom's Watch.

The third common vendor element is not met, however, because there is no information suggesting that SRCP used or conveyed material information about RCCNM or "Can't Trust" to Freedom's Watch. The complaint only states the use of a mutual vendor "further suggests" information sharing, but does not indicate what information, other than the identical pictures of Heinrich discussed *supra*, was actually shared. In fact, the substance of "Can't Trust" deals with an entirely different issue than "Asked to Explain." The only similarity is the two images that appear in both advertisements. *See* Complaint, Attachment 4. In addition, even if the common vendor elements were met, the firewall described *supra* would have further prevented information sharing. *See* 11 C.F.R. § 109.21(h). Therefore, it does not appear that the mutual use of SRCP as a vendor for the production of "Can't Trust" and "Asked to Explain" satisfies the conduct prong.

Finally, the complaint alleges that the conduct prong is met because a former NRCC employee is now a Freedom's Watch employee. For a former employee to satisfy the conduct prong, the Commission's regulations require, in relevant part, that: (1) a communication is paid for by the employer of a person who was an employee of a political party committee, during the previous 120 days; and (2) that the former employee uses or conveys to the person paying for the communication information about the political party committee, or information used by the

29044244189

former employee in providing services to the political party committee, and the information conveyed is material to the creation, production, or distribution of the communication. 11 C.F.R. § 109.21(d)(5).

Freedom's Watch's response acknowledges that Carl Forti, Freedom Watch's Executive Vice President of Issue Advocacy previously worked at the NRCC, but states that Forti ended his NRCC employment on December 31, 2006. Freedom's Watch Response at 2-3. Forti became Freedom's Watch's Executive Vice President in March 2008. *Id.* Since Forti was not employed by the NRCC, or the RCCNM, within 120 days of his employment at Freedom's Watch, the first requirement is not satisfied. Further, the complaint provides no information otherwise indicating that Forti conveyed information to Freedom's Watch that was material to the RCCNM or that it was used in "Asked to Explain," to fulfill the second requirement. Based on the foregoing analysis, the conduct prong is not satisfied, and therefore "Asked to Explain" is not a coordinated communication.

Since it appears that "Asked to Explain" was not a coordinated communication under the Commission's regulations, the advertisement was not an in-kind contribution to the RCCNM. Therefore, the Commission finds no reason to believe that Freedom's Watch, Inc. made an excessive or prohibited contribution in violation of 2 U.S.C. § 441a(a)(1) and 2 U.S.C. § 441b(a), in connection with "Asked to Explain."

2. Registration and Reporting

The remaining allegations, that Freedom's Watch failed to register as a political committee with the Commission and that Freedom's Watch failed to properly report coordination to the Commission, are based on the complaint's coordination allegation. Since it appears that "Asked to Explain" was not a coordinated communication, the Commission finds no reason to

29044244190

- 1 believe that Freedom's Watch, Inc. failed to register as a political committee in violation of
- 2 2 U.S.C. § 433, and no reason to believe that Freedom's Watch, Inc., failed to properly report
- 3 coordinated communications to the Commission in violation of 2 U.S.C. § 434(b).

29044244191